IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. ....

W. F. AND JOHN BARNES COMPANY, JOHN S. BARNES CORPORATION, AND ODIN CORPORATION,

Petitioners,

vs.

INTERNATIONAL HARVESTER COMPANY AND EX-CELL-O CORPORATION,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

The instant decision of the Circuit Court of Appeals has grave importance to every present or future litigant in the federal courts, particularly in the Seventh Circuit. The effect of the decision is to eliminate any positive rules to control trial courts in the taxation of costs. **Until the rendition of the instant decision, the general rule in this circuit forbade taxation of non-statutory items as costs.**[8]

8. See *McIntosh* v. *Ward* (C. C. A. 7, 1907), 159 Fed. 66, 69; *Allis-Chalmers Co.* v. *United States* (C. C. A. 7, 1908), 162 Fed. 679, 680; *Harding* v. *Corn Products Mfg. Co.* (C. C. A. 7, 1912), 198 Fed. 628, 630; *Tevander* v. *Ruysdael* (C. C. A. 7, 1924), 299 Fed. 746, 749; *Standard Scale & Supply Co. et al.* v. *Cropp Concrete Machinery Co. et al.* (C. C. A. 7, 1925), 6 F. (2d) 447.

Now no rule serves to guide either the litigant or the trial judge; the whole matter of cost taxation has been left to the uncontrolled discretion of the trial courts. The honest suitor will be discouraged in seeking justice. In the instant taxation the Circuit Court of Appeals has granted to the trial court an assumed power, in defiance of statute and in the absence of rule or established practice, to deprive the petitioners of $30,553.91 without due process of any law. In view of the general and widespread importance of the instant decree to all federal litigants, practitioners and courts, since the present decision is the result of serious error in the application of established rules of law, this Court should exercise its power of supervision and issue the writ of certiorari for which petition is made.

The petitioners take the position that a federal trial court may not, solely upon its own discretion, assume to tax as costs the prevailing parties' expenses of litigation; it may not include those expenses not specifically made taxable as items of costs by The Fee Bill Act or other statutory authority, as rule or established practice consistent with the statutes.

Preliminarily, the petitioners outline the background of the law relating to the taxation of costs in the federal courts. They then present the petitioners' reasons for believing that the instant decree should be reviewed by the Supreme Court.

CONGRESS INTENDED TO EXERCISE EXCLUSIVE CONTROL OF COSTS IN THE FEDERAL COURTS.

The first federal statute to mention costs was the Judicial Act of September 24, 1789, Chap. 20, 1 Stats. 73, which created the federal district and circuit courts. The Judicial Act contained references to costs but established

no fee bill. Five days later the Congress passed the Process Act of September 29, 1789, Chap. 21, 1 Stats. 93, which expressly adopted the modes of process and the rates of fees of the state courts as regulations in both the District and Circuit courts established by the Judicial Act. The Process Act was of a temporary nature, continuing in force for only three years, but it did establish the practice in the federal courts of following the law of the respective states to determine what items and amounts should be taxed as costs.

With respect to equity proceedings the act provided as follows:

> "And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law; and the rates of fees the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes."

After the practice of following the state law had continued under the Process Act for some fifty years, Congress amended the original Judicial Act of September 24, 1789, by Chapter 188, 5 Stats. 516, Act of August 23, 1842, and granted to the Supreme Court the exclusive power to prescribe the regulations in the trial courts as to the taxation and payment of costs in all proceedings. Chapter 188 also granted to the Supreme Court the exclusive power to make and prescribe a Fee Table to be applicable in the federal courts and provided "the items so stated in said table and none others shall be taxable or allowable in bills of costs." Chapter 188 has not been repealed expressly and except as repealed by implication from subsequent statutes, it should be deemed exclusive. At any rate, it renders illegal any implied discretion in the lower courts to determine what items constitute taxable costs. Presum-

ably it was intended to eliminate the practice of following state law so that taxation in the federal courts would be uniform.

About ten years later, Congress revoked the 1842 delegation to the Supreme Court and passed its own Fee Table, The Fee Bill Act of February 26, 1853, 10 Stats. 161. This Act has never been repealed, although sections of it have been amended from time to time to alter some of the charges fixed thereby. It is today, with its amendments, the sole statutory authority for cost taxation.

The Fee Bill Act was introduced in the 32nd Congress on January 29, 1852, as House of Representatives Bill No. 146. Rep. McLanahan had charge of the bill's passage in the House and described the bill as "a plan for the fair and just taxation of costs in the Federal Courts of the United States" (24 Cong. Globe 2086). He stated that the object of the bill was not "merely to reduce the fees of the ministerial officers of the federal courts" but that in addition it was

> "* * * to prepare a bill that will establish **a uniform system** for the taxation of costs;[9] to devise a law that will be explicit, definite and clear, so as to prevent all abuses growing out of ingenious interpretations, and to cut off all constructive services and all unnecessary prolixity and useless forms. * * * It will * * * prevent 'the pollers and exacters of fees' from fleecing those whose faults or misfortunes have driven them into courts of justice, and subjected them to the tender mercies of the law." (24 Cong. Globe 2089.)

He further stated that the "bill proposes **item fees for every item** that should be taxed" and described it as "**a**

9. Mr. Justice Frankfurter said: "* * * the Act of Feb. 26, 1853, * * * set a uniform scale of fees for 'party and party' costs in the Federal courts." *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 165.

uniform system that will work * * * throughout the whole United States—a system at once just, equal, equitable and economical." (24 Cong. Globe 2186.)

Rep. Seymour stated that the bill "not only assumes to provide for the regulation of fees and compensation for these officers of the government, but also the fees and *everything* that appertains to the administration of justice between citizens in civil suits, so far as compensation or fees are concerned." (24 Cong. Globe 2126.)

On February 12, 1853, Sen. Bradbury, who had charge of the bill in the Senate, urged the passage of "The Fee Bill" and remarked:

> "The bill is designed to regulate the fees and compensation of district attorneys, marshals, clerks, commissioners, jurors, and witnesses in the circuit and district courts of the United States, and **to prescribe the costs** which shall be taxed and recovered in these courts **against the losing party in civil suits.** The bill has, then, two objects in view; and a brief reference to the existing state of things, and the flagrant abuses that have grown up under the present system, will demonstrate the necessity of some measure of the kind.
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> **There is now no uniform rule** either for compensating the ministerial officers of the courts, or **for the regulation of the costs** in actions between private suitors. One system prevails in one district, and a totally different one in another; and in some cases it would be difficult to ascertain that any attention had been paid to any law whatever designed to regulate such proceedings.
>
> It is not only the officers of the courts, but the suitors also, that are affected by the present unequal, extravagant, and often oppressive system.
>
> It is to correct the evils and remedy the defects of the present system that the bill has been prepared and passed by the House of Representatives. **It attempts to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed.** It is

not in all respects such a bill as I would have preferred, but it is believed to be an improvement upon the present system." (27 Cong. Globe 207.)

Following the passage of this bill, the federal trial courts immediately recognized the legislative intent that the Fee Bill was exclusive. They forbade the taxation of items not specifically set forth in the statute.[10] Manifestly, the maxim *expressio unius est exclusio alterius* applies to The Fee Bill Act.

Since 1853, the Supreme Court of the United States has consistently recognized the force of the statute and has refused to permit the lower federal courts to tax as costs any items which are not specifically set forth in The Fee Bill Act or which are not authorized by any other statute enacted by the Congress.

It is true that the Supreme Court occasionally has broadly stated that questions of costs in equity are discretionary. Clearly, the discretion to which the Court refers must be understood as legal discretion, that is, a discretion to be exercised within the limits which The Fee Bill Act and other statutes fix in such cases. There is ample room for the exercise of this discretion without transcending any rule of law. The power should be limited to discretion to allow, withhold or apportion costs within statutory limits. In spite of the broad dicta, however, the Supreme Court has never gone beyond the Fee Bill Act, as originally enacted or as amended, in awarding non-statutory items of costs except in the following classes of items (none of which embraces the case at bar) namely:

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10. *United States* v. *One Package of Ready-Made Clothing*, D. C. N. Y. 1853, 27 Fed. Cas. 310, Case No. 15950; *Dedekam* v. *Vose*, C. C. N. Y. 1853, 7 Fed. Cas. 339, Case No. 3731; *Thorne* v. *The Victoria*, D. C. N. Y. 1852, 23 Fed. Cas. 1131, Case No. 13,988; and *Lyell* v. *Miller et al.*, C. C. Mich. 1855, 15 Fed. Cas. 1137, Case No. 8620.

1. Where the decree allows or the facts of the case warrant the taxation of "solicitor and client" costs, as in *Sprague* v. *Ticonic National Bank,* 307 U. S. 161.
2. Where the item is made taxable by rule or practice consistent with statute,[11] as in *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78.
3. Where the item is made taxable by state law,[12] as in *ex parte Peterson,* 253 U. S. 300.

Both the applicability and the validity of these exceptions may be eliminated from our consideration of the instant petition because the taxation is not urged on the basis of the stated exceptions, either by respondents' affidavits or by the opinion of the Circuit Court of Appeals.

With this background, the petitioners discuss the decree of the Circuit Court of Appeals and demonstrate that the award of an item of expense not established as taxable pursuant to any statute, is contrary to the pertinent decisions of this Court.

IN PERMITTING A DISTRICT COURT TO TAX AS COSTS ITEMS NOT MADE TAXABLE AS SUCH BY STATUTE, RULE, OR PRACTICE, THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Circuit Court of Appeals is largely premised upon the following language, quoted in the decision, from the opinion in *ex parte Peterson,* 253 U. S.

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11. The statutory authority for this exception is perhaps based upon Title 28 U. S. C., Sections 723(b), 723(c), 730 and 731.

12. The statutory authority for this exception is perhaps based upon Title 28 U. S. C., Sections 723, 724 and 725, and upon the usage established under The Process Act of Sept. 29, 1789, 1 Stats. 93.

300, and upon *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, to which cases the Circuit Court of Appeals referred immediately after quoting from The Fee Bill Act. The quotation from the *Peterson* case is (pp. 315-316):

> "Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury. Equity Rule 68 provides for taxing the fees of masters and Rule 50 for the expense of a stenographer. Both rules embody substantially the practice which had theretofore prevailed generally in equity proceedings, and which in the Southern District of New York had been followed not only in equity * * * but also in admiralty * * *
>
> "The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes."

The Circuit Court of Appeals has interpreted this language to mean that there need be no statutory authority to warrant the taxation of expenses of litigation as "costs"; but that a trial court has a wide discretion in the absence of statute to determine what items are taxable as costs.

The interpretation put upon the *Peterson* and *Newton* cases is erroneous; does not consider the decisions as a whole; and does not give consideration to subsequent decisions of the Supreme Court relating to costs. Whether statutory authority for the taxation of costs be found in one statute or in many, statutory authority must be found, either directly defining taxable items or indirectly giving rise to a rule or usage founded upon statutory authority.

At least twice since the decisions in the *Newton* and *Peterson* cases, two Circuit Courts of Appeals have made the

same error as that into which the Circuit Court of Appeals fell in the instant case. Each of these decisions, one from the Eighth Circuit and one from the Tenth Circuit has been reviewed on certiorari by the Supreme Court; each has been reversed.

Guardian Trust Co. v. *Kansas City Southern Ry. Co.*, arose in the Eighth Circuit. The Circuit Court of Appeals, 28 F. (2d) 233, determined that Guardian Trust Company might have taxed as costs in its favor certain expenses of litigation as well as attorneys' fees, relying upon the *Peterson* and *Newton* decisions.

Upon certiorari, 281 U. S. 1, the question before the Court is stated as follows: (p. 4)

> "The question is whether the Guardian Trust Company, in addition to amounts taxable as costs between party and party, is entitled to recover anything on on account of counsel fees **or other expenses** as costs between solicitor and client."

The Court answered the question in the negative, reversing the Eighth Circuit, stating at p. 9, the following:

> "The decree here affirmed required the 'taxation of costs . . . under the principles, rules and practice in equity.' It undoubtedly covered ascertainment of amounts taxable between party and party. There was no specific reference to any additional allowance. The language used disclosed no intention to require more than the usual taxation. **When used in a judgment or decree without qualification, the word 'costs' means the amounts taxable as such under Acts of Congress, rules promulgated by its authority and practice established consistently with governing enactments.** *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 83. *Ex parte Peterson*, 253 U. S. 300, 316. In actions at law costs follow the result as of course, but in equity costs not

otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. The nominal amounts fixed by statute (28 U. S. C. §§ 571, 572) and taxable as attorneys' fees are not meant to cover the compensation to which lawyers in charge of the litigation are reasonably entitled. A decree merely allowing costs to be taxed does not mean that anything is to be included on account of counsel fees in addition to the amount specified in the statute. **Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client** and to include therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—**the purpose to authorize such costs and to make such allowance should be clearly expressed in the decree.** 2 Daniell's Chancery Pleading and Practice, 6th Ed. p. 1410."

In support of this decision the Court cited its previous decision in the *Peterson* and *Newton* cases. The Court lifted a beacon light that the decisions in those cases permit no departure from statutory authority.

But again in *Buchhalter* v. *Rude,* 54 F. (2d) 834, a Circuit Court of Appeals fell into error, this time the Tenth Circuit. At p. 838 of the opinion, the Court stated the contention against the taxation of costs, as follows:

> "* * * it is earnestly insisted that this court is without power, according to the established usages of equity, to allow the **expenses of litigation,** including counsel fees, to the prevailing party; that the only counsel fees which may be allowed are those in the statute covering taxable costs."

This contention was overruled by a determination that the trial court had power to tax as costs expenses of litigation which have no foundation in statute.

Upon certiorari the Circuit Court of Appeals was reversed, 286 U. S. 451. The argument of the petitioner is summarized at p. 453 as follows:

> "The decree awarding such fees and expenses is contrary to principle and to all precedent. 'Fee bill' statute, 28 U.S.C., §§ 571-572.
>
> "In contemplation of law the fees prescribed in the fee bill are full indemnity for the litigation and, **while a court of equity has discretion to award, withhold or apportion costs, the amount of costs which the court may award is limited by the statute.**[13] *Henkel* v. *Chicago, St. P. M. & O. R. Co.*, 284 U. S. 444; *Arcambel* v. *Wiseman*, 3 Dall. 306; *Hauenstein* v. *Lynham*, 100 U. S. 483; *The Baltimore*, 8 Wall. 377; *Motion Picture Co.* v. *Steiner*, 201 Fed. 63; *Guardian Trust Co.* v. *Kansas City Sou. Ry. Co.*, 28 F. (2d) 233, reversed 281 U. S. 1".

In its decision, the Court said (p. 459):

> "First to be considered is the command of the Circuit Court of Appeals that the district court deduct from petitioner's share the 'court costs and **expenses** to which Buchhalter' has 'been put in this litigation including reasonable attorneys' fees to be determined by the trial court.'
>
> "This is not a taxation of costs as between solicitor and client. Cf. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 28 F. (2d) 233; 281 U. S. 1. **The only costs allowed to be included** in the money judgment against petitioner **are those taxable as between party and party;** counsel fees or **other expenses not so taxable are not to be included.**"

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13. The Illinois Supreme Court states: "While a court of equity has discretion in awarding costs in chancery causes, it must confine that discretion to the fees allowed by the statute." *Constant* v. *Matteson*, 22 Ill. 546, 560.

The Supreme Court not only disallowed attorneys' fees in reversing the Eighth and Tenth Circuits but also disallowed "other expenses" of litigation. For instance in the *Kansas City* case, these "other expenses" were incident to the testimony of an accounting expert, squarely analogous to the expenses taxed here as incident to the testimony of a patent expert. Furthermore, the *Kansas City* and *Buchhalter* decisions make it clear that in a decree providing without qualification for the taxation of costs only party to party costs are taxable and that in addition such costs must find statutory sanction either directly or in rules or practice promulgated and established under statutory authority. Particularly the *Kansas City* case makes clear that the discretion of a trial court in equity as to costs extends only to the giving or withholding of costs and not as to the items which are taxable as costs between party and party. Consistently the Supreme Court has so held since 1870. See *in re Paschal,* 77 U. S. 483, 493; and *Trustees* v. *Greenough,* 105 U. S. 527, 533. Each of these cases holds that as between party and party, taxed costs are confined to those allowed by The Fee Bill Act.

In *Sprague* v. *Ticonic National Bank* (1939), 307 U. S. 161, the Court observed, page 165, footnote 2, that

> "The power of the Federal Courts to give costs was recognized by implication in the First Judiciary Act. Act of September 24, 1789, Ch. 20, Sec. 20, 1 Stat. 83. The statutory system prior to 1853 required 'party and party' costs to be taxed on the basis of the fees allowed by state practice, but **the Act of Febr. 26, 1853, Ch. 80, 10 Stat. 161, set a uniform scale of fees for 'party and party' costs** in the Federal Courts."

IN REACHING THE CONCLUSION THAT THE DISCRETIONARY POWER OF A FEDERAL COURT OF EQUITY SITTING IN ILLINOIS TO AWARD, WITHHOLD OR APPORTION COSTS EXTENDS TO A DISCRETION TO DETERMINE WHAT EXPENDITURES OF LITIGATION ARE TAXABLE AS COSTS TO EITHER PARTY, THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

An additional fallacy in the opinion of the Circuit Court of Appeals is the determination that a federal trial court has discretionary power to determine what items are taxable as costs between the parties.

The Supreme Court has decided this contention adversely to the decision of the Circuit Court of Appeals.

The case of *The Baltimore* (1869), 75 U. S. (8 Wall.) 377, is one of the first Supreme Court decisions to make a thorough analysis of the law of costs subsequent to the passage of The Fee Bill Act. This case discusses costs law both prior to and subsequent to the Act and concludes that the prevailing party in federal litigation is entitled to costs. The opinion of the Court states, page 390,

> "* * * that Congress intended to leave the whole matter to the discretion of the court trying the case * * * **cannot be admitted.**"

Again in *Oelrichs* v. *Spain* (1872), 82 U. S. (15 Wall.) 211, 231, this court held that a court of equity may allow "only the taxable costs" and held that there must be fixed standards for each item of costs to be taxed in the federal courts.

It is true that both *The Baltimore* and the *Oelrichs* cases are directed primarily to attorneys' fees, but the reasoning

applies to all cost taxation. Indeed, this court has unequivocally asserted the general principle that a federal court has no discretion or power beyond the limits of the law in *Osborn* v. *Bank of the United States* (1824, Opinion of the court by Mr. Chief Justice Marshall) 22 U. S. (9 Wheat.) 738, 866. See also, *Langnes* v. *Green* (1931, Opinion of the Court by Mr. Justice Sutherland) 282 U. S. 531, 541.

Since there is no federal statute granting such discretion to a court in equity, it becomes pertinent to examine the state authorities under the doctrine recognized by *Erie Railway Co.* v. *Tompkins* (1938), 304 U. S. 64, 78, and *ex Parte Peterson* (1920), 253 U. S. 300. The state authorities are likewise uniform in their holding that while a court of equity has a discretion in awarding costs in chancery causes, it must confine that discretion to the fees allowed by statute. *Constant* v. *Matteson* (1859), 22 Ill. 546, 560; *Goudy* v. *Mayberry* (1916), 272 Ill. 54, 58; and *Ritter* v. *Ritter* (1943), 381 Ill. 549, 553.

In *Ritter* v. *Ritter* (Ill. Supreme Court 1943), 381 Ill. 549, the Court collected a substantial majority of the Illinois authorities and, at page 552, said:

> "The allowance and recovery of costs rests entirely upon statutory provisions and no liability for costs exists in the absence of statutory authorization. Any party to an action, claiming the right to recover costs from his adversary, must found his right upon some provision of a statute. This has been the law in this state from the earliest time (citing cases). A court of chancery may be vested with a power to exercise a discretion in awarding costs **but the power to act must come from a statute and the discretion must be confined to that which is authorized by legislative enactment.** (Citing cases.)

"The rule is also well established that attorney fees and **the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of a statute** or in the absence of some agreement or stipulation specially authorizing the allowance thereof, and **this rule applies equally in courts of law and in courts of equity.** (Citing cases.) Our statutes authorize the taxation of solicitor's fees as costs in partition cases but prior to the act authorizing it, the law was that they could not be so taxed. (Citing cases.)

"It may be that the statutory costs awarded to a successful plaintiff are inadequate to compensate him for the injury caused by the defendant's wrongful conduct, but **the question of the amount of costs which are to be allowed the successful party and the items of expense to be included therein is a question to be determined by the legislature and not by the courts.** (Citing cases.)

IN PURPORTING TO CONSTRUE THE FEE BILL ACT OF 1853 WITHOUT CONSIDERING LEGISLATIVE INTENT, THE CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The instant decree of the Circuit Court of Appeals involves a construction of The Fee Bill Act of 1853. The petitioners contended that there must be specific statutory authority before an item may be taxed as costs, and that authority to tax all party and party costs is derived from The Fee Bill Act of 1853, especially 28 U. S. C. Section 830. The Circuit Court of Appeals in interpreting that statute, without consideration of its legislative history and the manifest intent of Congress, ignored "the duty of the court to discover the intention of the legislature, and to

respect that intention." *Pennington* v. *Coxe* (1804, Opinion of the Court by Mr. Chief Justice Marshall) 6 U. S. (2 Cranch.) 33, 59.

The remarks of the legislators in charge of the passage of the Bill in Congress, both in the House and in the Senate, clearly show that Congress intended the Act to be exclusive of all party to party costs (see this brief, pages 15 to 17).

In *Harrison* v. *Northern Trust Co.* (1943, Opinion by Mr. Justice Murphy), 317 U. S. 476, the court granted certiorari to the Circuit Court of Appeals for the Seventh Circuit for the purpose of construing an Act of Congress. At page 479, the Court said:

> "In so doing, the court below refused to examine the legislative history of Section 807, on the ground that the section was unambiguous.
>
> "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination'."

In the performance of the function of interpreting a statute, the Court universally interprets the words of the statute in the light of its legislative history and explanations given on the floor of Congress by those in charge of the measure. *Wright* v. *Vinton Branch,* (1937), 300 U. S. 440, 463; *Foster* v. *United States* (1938) 303 U. S. 118, 120; *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 489; *United States* v. *Cooper Corp.* (1941), 312 U. S. 600, 605; *Colgate Co.* v. *United States* (1943), 320 U. S. 422, 429; *Harrison* v. *Northern Trust Co.* (1943), 317 U. S. 476, 479.

This failure to consider the legislative history, in view of the universal practice of the Supreme Court, should impel this Court to exercise its power of supervision.

IF THE SUPREME COURT DID INTEND TO ESTABLISH NEW RULES FOR TAXATION OF COSTS IN EX PARTE PETERSON, THE DECISION SHOULD BE EITHER LIMITED OR OVERRULED.

The Circuit Court of Appeals purports to base its decision upon the rule of *ex parte Peterson,* 253 U. S. 300, subsequently reiterated in *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78 (R. 200). Under Point I above (see this brief, page 18), the petitioners' position is that the rule therein stated does not justify the disputed taxation. However, if this court is of the opinion that the rule of *ex parte Peterson* as a matter of law does justify the decision of the Circuit Court of Appeals, the petitioners submit that such rule is erroneous and should be overruled or qualified. Certiorari has been granted for the purpose of overruling or qualifying decisions of this court in the cases cited in the footnote.[14]

The broad interpretation given to the *Peterson* decision by the Circuit Court of Appeals is patently at variance with the expressed intent of the legislature and with the judicial recognition of that legislative intent for a period of over ninety years, commencing immediately after the passage of the Fee Bill. Under such circumstances, the *Peterson* case should not be extended to distort the term "**usage** long continued by implication from provisions of many statutes." In effect the Circuit Court of Appeals' interpretation is synonymous with "**discretion.**" If the *Peterson* case so holds, it should be reversed.

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14. *Baltimore & Carolina Line* v. *Redman* (1935), 295 U. S. 654, 661; *Pokora* v. *Wabash Railway Co.* (1934), 292 U. S. 98, 106; *Ohl & Co.* v. *A. L. Smith Iron Works* (1933), 288 U. S. 170, 175; *Helvering* v. *Hallock* (1940), 309 U. S. 106, 119; *Graves* v. *Schmidlapp* (1942), 315 U. S. 657, 665.

The Supreme Court has said that no federal court has

> "powers limited by its own discretion merely. • • • the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, • • • The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."[15]

In *Helvering* v. *Hallock* (1940), 309 U. S. 106, 119, Mr. Justice Frankfurter delivered the opinion of the court and said:

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

The stretched adherence of the Circuit Court of Appeals with the *Peterson* decision involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. The prior doctrine which limits taxation to statutory items and amounts is wholly justified. It covers the entire subject of fees and costs in the federal courts; it is soundly based upon the Constitution of

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15. *Cary* v. *Curtis* (1845), 44 U. S. (3 How.) 236, 245.

See, also *Bollman* v. *Swartwout* (1807), 8 U. S. (4 Cr.) 75, 93; *The Mayor* v. *Cooper* (1867), 73 U. S. (6 Wall.) 247, 252; *Case of the Sewing Machine Companies* (1873), 85 U. S. (18 Wall.) 553, 577; *Fink* v. *O'Neil* (1882), 106 U. S. 272, 280; *Kentucky* v. *Powers* (1906), 201 U. S. 1, 24; *Ebert* v. *Poston* (1925), 266 U. S. 548, 554; *U. S.* v. *Cooper Corporation* (1941), 312 U. S. 600, 605; *11 Am. Juris. 900, Constitutional Law, Sec. 198.*

the United States and upon the expressed intention of Congress.

The *Peterson* case has been cited alone on questions involving the allowance of costs as distinguished from its taxation. On this question there is substantial agreement that the *Peterson* case holds that a prevailing party in an action at law is entitled to all costs as a matter of right.[16] (This rule has been now changed by Rule 54(d) R. C. P.[17].) Other cases cite the *Peterson* decision to show that a court of equity has discretion to disallow costs[18] and to apportion costs.[19]

It is when we reach the application of the *Peterson* and *Newton* cases to cost taxation that a true confusion is discovered. Some cases construe the language of the *Peterson* cases very strictly and limit costs to an established practice[20] or rule of court.[21] On the other hand, other cases construe the language of the cases very broadly and hold that the statutes and rules are not exclusive, and that items may be allowable in the discretion of the court.[22] Two of

16. *Perkins* v. *Thomas* (C. C. A. 5, 1936), 86 F. (2d) 954, 957. *United States* v. *E. J. Biggs Const. Co.* (C. C. A. 7, 1940), 116 F. (2d) 768, 775.

17. *United States* v. *E. J. Biggs Const. Co.* (C. C. A. 7, 1940), 116 F. (2d) 768, 775.

18. *Andersen, Meyer & Co.* v. *Fur & Wool Trading Co.* (C. C. A. 9, 1926), 14 F. (2d) 586, 589.

19. *Ladd* v. *Tallman* (C. C. A. 4, 1932), 59 F. (2d) 732, 733.

20. *Kansas City Southern Ry. Co.* v. *Trust Co.* (1930), 281 U. S. 1, 9, *Crowe* v. *Peaslee Gaulbert Co.* (C. C. A. 1, 1930), 37 F. (2d) 216, 220. *Kroger Grocery & Baking Co.* v. *Martin* (C. C. A. 6, 1938), 97 F. (2d) 348, 349.

21. *Kansas City So. Ry. Co.* v. *Trust Co.* (1930), 281 U. S. 1, 9. *In re Borok* (C. C. A. 2, 1931), 50 F. (2d) 75, 78.

22. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.* (C. C. A. 8, 1928), 28 F. (2d) 233, 242, 243. Reversed 281 U. S. 1. *Buchhalter* v. *Rude* (C. C. A. 10, 1931), 54 F. (2d) 834, 838. Reversed 286 U. S. 451. *Harris* v. *Twentieth Century-Fox* (C. C. A. 2, 1943), 139 F. (2d) 571, 572.

the cases construing the language thus broadly have been reversed.[23] These two viewpoints are wholly incompatible.

In addition, the cases are sometimes cited to sustain the viewpoint that federal courts follow the state laws in the absence of express federal statute.[24] Still other decisions cite the *Peterson* and *Newton* cases to sustain the taxation of compensation for officers of the court appointed by prior order of the court.[25] Neither of these viewpoints is invoked to justify the instant taxation.

The granting of certiorari will enable the Supreme Court to qualify or limit the scope of the *Peterson* case so as to eliminate this confusion. Pertinently, the viewpoints taken by this Circuit Court of Appeals to justify the instant taxation has twice been reversed.

CONCLUSION.

In conclusion, it is apparent that The Fee Bill Act and subsequent federal statutory authority either are or are not the exclusive law of costs in the federal courts. If they are exclusive, as the petitioners assert, then the judgment is in error, because it does not justify the taxation upon The

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23. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.* (C. C. A. 8, 1928), 28 F. (2d) 233, 242, 243. Reversed 281 U. S. 1. *Buchhalter* v. *Rude* (C. C. A. 10, 1931), 54 F. (2d) 834, 838. Reversed 286 U. S. 451.

24. *Sioux County* v. *National Surety Co.* (1928), 276 U. S. 238, 241. *Henkel* v. *Chicago etc. Ry.* (1932), 284 U. S. 444, 446. *National Surety Co.* v. *Lyons* (C. C. A. 8, 1926), 16 F. (2d) 688, 692. *Williams* v. *Sawyer Bros.* (C. C. A. 2, 1931), 51 F. (2d) 1004. *American Title & Trust Co.* v. *Gulf Refining Co.* (C. C. A. 2, 1934), 72 F. (2d) 248, 251. *Gleckman* v. *United States* (C. C. A. 8, 1935), 80 F. (2d) 394, 399, 403. *Gold Dust Corporation* v. *Hoffenberg* (C. C. A. 2, 1937), 87 F. (2d) 451, 453.

25. *Franz* v. *Buder* (C. C. A. 8, 1930), 38 F. (2d) 605, 606. *Associated Almond Growers* v. *Wymond* (C. C. A. 9, 1934), 69 F. (2d) 912, 914. *Graffis* v. *Woodward* (C. C. A. 7, 1938), 96 F. (2d) 329, 332.

Fee Bill Act or upon any other statutory authority. If they are not exclusive, then since there is no general federal law, the Circuit Court of Appeals should have looked to the law of the State of Illinois, and the judgment is in error for failure to apply the state law. In either case, it follows that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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